providers of ACS that qualify as small business concerns under the SBA's rules and size standards, pending development of a record to determine whether small entities should be permanently exempted and, if so, what criteria should be used to define small entities.[553] We find that good cause exists for this temporary exemption.[554]

205. Despite the lack of a meaningful substantive record on which to adopt a permanent exemption, without a temporary exemption we run the risk of imposing an unreasonable burden upon small entities and negatively impacting the value they add to the economy.[555] At the same time, the absence of meaningful comments on any exemption criteria prohibits us from conclusively determining their impact on consumers and businesses. This temporary exemption will enable us to provide relief to those entities that may possibly lack legal, financial, or technical capability to comply with the Act until we further develop the record to determine whether small entities should be subject to a permanent exemption and, if so, the criteria to be used for defining which small entities should be subject to such permanent exemption.

206. We temporarily exempt entities that manufacture ACS equipment or provide ACS that, along with any affiliates, meet the criteria for a small business concern for their primary industry under SBA's rules and size standards.[556] A small business concern, as defined by the SBA, is an "entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."[557] Entities are affiliated under the SBA's rules when an entity has the power to control another entity, or a third party has the power to control both entities,[558] as determined by factors including "ownership, management, previous relationships with or ties to another concern, and contractual relationships."[559] A concern's primary industry is determined by the "distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year,"[560] and other factors including "distribution of patents, contract awards, and assets."[561]

207. The SBA has established maximum size standards used to determine whether a

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[553] *See* 13 C.F.R. § 121.201.

[554] *See* 5 U.S.C. § 553(b)(B). Consistent with Congressional intent, we have consulted with the SBA in coordination with the Commission's Office of Communications Business Opportunity. *See* House Report at 26.

[555] Further, given the short statutory deadline, we are unable to seek additional comment on a permanent solution prior to the adoption of the *Report and Order*. We adopt the temporary exemption because we believe it is necessary to grant immediate relief to all small entities pending development of a record to determine whether small entities should be exempted, and if so, what criteria should be used to define small entities.

[556] 13 C.F.R. §§ 121.101 – 121.201.

[557] 13 C.F.R. § 121.105(a)(1).

[558] 13 C.F.R. § 121.103(a)(1).

[559] 13 C.F.R. § 121.103(a)(2).

[560] 13 C.F.R. § 121.107.

[561] 13 C.F.R. § 121.107.

business concern qualifies as a small business concern in its primary industry.[562] The SBA has generally adopted size standards based on the maximum number of employees or maximum annual receipts of a business concern.[563] The SBA categorizes industries for its size standards using the North American Industry Classification System ("NAICS"), a "system for classifying establishments by type of economic activity."[564] Below we identify some NAICS codes for possible primary industry classifications of ACS equipment manufacturers and ACS providers and the relevant SBA size standards associated with the codes.[565]

| | NAICS Classification[566] | NAICS Code | SBA Size Standard[567] |
|---|---|---|---|
| Services[568] | Wired Telecommunications Carriers | 517110 | 1,500 or fewer employees |
| | Wireless Telecommunications Carriers (except satellites) | 517210 | 1,500 or fewer employees |
| | Telecommunications Resellers | 517911 | 1,500 or fewer employees |
| | All Other Telecommunications | 517919 | $25 million or less in annual receipts |
| | Software Publishers | 511210 | $25 million or less in annual receipts |
| | Internet Publishing and Broadcasting and Web Search Portals | 519130 | 500 or fewer employees |
| | Data Processing, Hosting, and Related Services | 518210 | $25 million or less in annual receipts |
| Eq | Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing | 334220 | 750 or fewer employees |

[562] *See* 13 C.F.R. § 121.201.

[563] 13 C.F.R. § 121.106 (describing how number of employees is calculated); 13 C.F.R. § 121.104 (describing how annual receipts is calculated).

[564] North American Industry Classification System; Revision for 2012, 76 Fed. Reg. 51240 (Aug. 17, 2011) ("*NAICS Final Decision*").

[565] This is not a comprehensive list of the primary industries and associated SBA size standards of every possible manufacturer of ACS equipment or provider of ACS. This list is merely representative of some primary industries in which entities that manufacture ACS equipment or provide ACS may be primarily engaged. It is ultimately up to an entity seeking the temporary exemption to make a determination regarding their primary industry, and justify such determination in any enforcement proceeding.

[566] The definitions for each NAICS industry classification can be found by entering the six digit NAICS code in the "2007 NAICS Search" function available at the NAICS homepage, http://www.census.gov/eos/www/naics/index.html. The U.S. Office of Management and Budget has revised NAICS for 2012, however, the codes and industry categories listed herein are unchanged. OMB anticipates releasing a 2012 NAICS UNITED STATES MANUAL or supplement in January 2012. *See NAICS Final Decision*, 76 Fed. Reg. at 51240.

[567] See 13 C.F.R. § 121.201 for a full listing of SBA size standards by six-digit NAICS industry code. The standards listed in this column establish the maximum size an entity in the given NAICS industry may be to qualify as a small business concern.

[568] *See* Providers of Advanced Communications Services, Section III.A.3, *supra.*

| | | | |
|---|---|---|---|
| | Electronic Computer Manufacturing | 334111 | 1,000 or fewer employees |
| | Telephone Apparatus Manufacturing | 334210 | 1,000 or fewer employees |
| | Other Communications Equipment Manufacturing | 334290 | 750 or fewer employees |
| | Software Publishers | 511210 | $25 million or less in annual receipts |
| | Internet Publishing and Broadcasting and Web Search Portals | 519130 | 500 or fewer employees |

208. This temporary exemption is self-executing. Entities must determine whether they qualify for the exemption based upon their ability to meet the SBA's rules and the size standard for the relevant NAICS industry category for the industry in which they are primarily engaged. Entities that manufacture ACS equipment or provide ACS may raise this temporary exemption as a defense in an enforcement proceeding. Entities claiming the exemption must be able to demonstrate that they met the exemption criteria during the estimated start of the design phase of the lifecycle of the product or service that is the subject of the complaint. If an entity no longer meets the exemption criteria, it must comply with Section 716 and Section 717 for all subsequent products or services or substantial upgrades of products or services that are in the development phase of the product or service lifecycle, or any earlier stages of development, at the time they no longer meet the criteria.[570]

209. The temporary exemption will begin on the effective date of the rules adopted in this *Report and Order*.[571] The temporary exemption will expire on the earlier of (1) the effective date of small entity exemption rules adopted pursuant to the *Further Notice*; or (2) October 8, 2013.

### D. Additional Industry Requirements and Guidance

#### 1. Performance Objectives

210. *Background.* Section 716(e)(1)(A) of the Act provides that in prescribing regulations for this section, the Commission shall "include performance objectives to ensure the accessibility, usability, and compatibility of advanced communications services and the equipment used for advanced communications services by individuals with disabilities."[572]

211. *Discussion.* As proposed in the *Accessibility NPRM*,[573] we adopt as general performance objectives the requirements that covered equipment and services be accessible, compatible and usable. We incorporate into these general performance objectives the outcome-

(Continued from previous page)

[569] *See* Manufacturers of Equipment Used for Advanced Communications Services, Section III.A.2, *supra.*

[570] Covered entities must consider accessibility, and whether accessibility is achievable, during product design. *See* Achievable Standard, Section III.B.1, *supra.* Covered entities must also comply with the recordkeeping and annual certification obligations in Section 717 of the Act. 47 U.S.C § 618(a)(5); *see* Recordkeeping, Section III.E.1, *supra.* Since the small entity exemption relieves entities of the obligation to conduct an achievability analysis, the exemption focuses on the characteristics of the entity (employee figures or annual receipt data) during the design phase of the product lifecycle.

[571] *See* Phased in Implementation, Section III.A.5, *supra.*

[572] 47 U.S.C. § 716(e)(1)(A).

[573] *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 105.

oriented definitions of accessible,[574] compatibility[575] and usable,[576] contained in sections 6.3 and 7.3 of the Commission's rules. Most commenters in the record support this approach.[577] The IT and Telecom RERCs, however, disagree and propose that we reframe our Part 6 requirements as goals and testable performance criteria.[578] Because the IT and Telecom RERCs filed their proposal in their Reply Comments, we seek comment in the accompanying *Further Notice* on the IT and Telecom RERCs' general approach and on specific testable performance criteria.[579]

212. We do not adopt specific performance objectives at this time. As we discuss in greater detail in Performance Objectives, Section IV.F, *infra,* we will defer consideration of specific performance criteria until the Access Board adopts Final Guidelines.[580] As proposed in the *Accessibility NPRM*,[581] we will wait until after the EAAC provides its recommendations on issues relating to the migration to IP-enabled networks, including the adoption of a real-time text standard, to the Commission in December 2011 to update our performance objectives, as appropriate.[582]

### 2. Safe Harbors

213. *Background.* Section 716(e)(1)(D) of the Act provides that the Commission "shall . . . not mandate technical standards, except that the Commission may adopt technical standards as a safe harbor for such compliance if necessary to facilitate the manufacturers' and service providers' compliance" with the accessibility and compatibility requirements in Section

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[574] *See* 47 C.F.R. § 6.3(a) which provides that "input, control, and mechanical functions shall be locatable, identifiable, and operable" as follows:

-Operable without vision
-Operable with low vision and limited or no hearing
-Operable with little or no color perception
-Operable without hearing
-Operable with limited manual dexterity
-Operable with limited reach or strength
-Operable without time-dependent controls
-Operable without speech
-Operable with limited cognitive skills

[575] 47 C.F.R. § 6.3(b)(1-4).

[576] 47 C.F.R. § 6.3(l). Section 6.3(l) provides that "usable" "mean[s] that individuals with disabilities have access to the full functionality and documentation for the product, including instructions, product information (including accessible feature information), documentation, and technical support functionally equivalent to that provided to individuals without disabilities."

[577] CEA Comments at 29; Consumer Groups Comments at 22; TIA Comments at 30, 33; T-Mobile Comments at 12; Verizon Comments at 13; Wireless RERC Comments at 6; Words + Compusult Comments at 29; Consumer Groups Reply Comments at 6; T-Mobile Reply Comments at 14. *But see* Microsoft Comments at 13-14.

[578] IT and Telecom RERCs Reply Comments at 5.

[579] *See* Performance Objectives, Section IV.F, *infra.*

[580] TIA Comments at 32-33.

[581] *Accessibility NPRM*, 26 FCC Rcd at 3172, ¶ 107.

[582] *See* AFB Reply Comments at 13 (arguing that this rulemaking informs the work of the EAAC).

716.[583]

214. The vast majority of commenters responding to the *October Public Notice* opposed establishing technical standards as safe harbors.[584] CTIA and AT&T asserted that safe harbors would result in *de facto* standards being imposed that would limit the flexibility of covered entities seeking to provide accessibility.[585] The IT and Telecom RERCs stated that the Commission's rules should not include safe harbors because "technology, including accessibility technology, will develop faster than law can keep up."[586] AFB asserted that it is too early in the CVAA's implementation "to make informed judgments . . . about whether and which safe harbors should be available."[587] While ITI supported safe harbors, noting they provide clarity and predictability, it warned against using safe harbors "to establish implicit mandates [that] . . . lock in particular solutions."[588] In light of the concerns raised in the record, the Commission proposed not to adopt any technical standards as safe harbors, and sought comment on its proposal.[589]

215. *Discussion.* We decline, at this time, to adopt any technical standards as safe harbors. The majority of commenters either oppose the Commission adopting technical standards as safe harbors or only support the adoption of safe harbors subject to important limitations and qualifications.[590] CEA, for example, argues that safe harbors should only be used in limited circumstances and warns that the Commission should not lock in outdated technologies or impose implicit mandates.[591] The IT and Telecom RERCs assert that APIs should be encouraged, but should not be a safe harbor.[592] ITI, however, argues that we should adopt safe harbors as a "reliable and sustainable method to achieve interoperability between" all of the components

[583] 47 C.F.R. § 617(e)(1)(D).

[584] AT&T Comments to *October Public Notice* at 7; CEA Comments to *October Public Notice* at ii and 15; CTIA Comments to *October Public Notice* at 11-12; RERC-IT Comments to *October Public Notice* at 8; ACB Reply Comments to *October Public Notice* at 22; AFB Reply Comments to *October Public Notice* at 7; CTIA Reply Comments to *October Public Notice* at 5; RERC-IT Reply Comments to *October Public Notice* at 7.

[585] AT&T Comments to *October Public Notice* at 7; CTIA Comments to *October Public Notice* at 11..

[586] RERC-IT Reply Comments to *October Public Notice* at 7.

[587] AFB Reply Comments to *October Public Notice* at 7. ACB urges that if the Commission establishes safe harbors, it provide a framework for assessing these standards. ACB Reply Comments to *October Public Notice* at 21-22.

[588] ITI Comments to *October Public Notice* at 10.

[589] *See, e.g.*, CEA Comments to *October Public Notice* at 15; Microsoft Comments to *October Public Notice* at 3.

[590] CEA Comments at 39; IT and Telecom RERCs Comments at 38; ITI Comments at 17; TechAmerica Comments at 9; TIA Comments at 32 (arguing that the Commission should not mandate certain standards, but supporting the use of industry-developed technical standards as a safe harbor for compliance where necessary); VON Coalition Comments at 7-8; Words+ and Compusult Comments at 32; Letter from Ken J. Salaets, Director Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed June 10, 2010).

[591] CEA Comments at 39.

[592] IT and Telecom RERCs Reply Comments at 4.

necessary to make ACS accessible.[593] AFB and Words+ and Compusult argue that it is still too early in the implementation of the CVAA to make informed judgments about whether safe harbor technical standards should be established.[594] We do not have enough of a record at this time to evaluate ITI's proposal or to decline to adopt a safe harbor, and seek further comment on this issue in the accompanying *Further Notice*.[595]

### 3. Prospective Guidelines

216. *Background.* Section 716(e)(2) of the Act requires the Commission to issue prospective guidelines concerning the new accessibility requirements.[596] While the Senate Report did not discuss this provision, the House Report notes that such guidance "makes it easier for industry to gauge what is necessary to fulfill the requirements" by providing industry with "as much certainty as possible regarding how the Commission will determine compliance with any new obligations."[597]

217. In the *Accessibility NPRM*, the Commission sought comment on a proposal by the RERC-IT, endorsed by ACB, that the Commission use "an approach to the guidelines similar to that used by the World Wide Web Consortium's Web Content Accessibility Guidelines, which provide mandatory performance-based standards and non-mandatory technology-specific techniques for meeting them."[598] The Commission also sought comment on whether any parts of the Access Board's Draft Guidelines on Section 508 should be adopted as prospective guidelines.[599] In addition, the Commission sought comment on the process for developing prospective guidelines, including asking whether the Commission should establish a consumer-industry advisory group to prepare guidelines.[600]

218. *Discussion.* We generally agree with CEA that because the Access Board's draft guidelines "may still change significantly," we should allow the Access Board to complete its review and issue Final Guidelines before we adopt prospective guidelines in accordance with Section 716(e)(2) of the Act.[601] We agree with the IT and Telecom RERCs that the Commission

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[593] ITI August 9 *Ex Parte* at 2. *See also* Letter from Ken J. Salaets, Director, Information Technology Industry Council, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213 (filed Aug. 22, 2011) ("ITI August 11 *Ex Parte*").

[594] AFB Reply Comments to *October Public Notice* at 7; Words+ and Compusult Comments at 32.

[595] Safe Harbors, Section IV.G, *infra.*

[596] 47 U.S.C. § 617(e)(2).

[597] *See* House Report at 25.

[598] *Accessibility NPRM,* 26 FCC Rcd at 3175, ¶ 115; RERC-IT Comments to *October Public Notice* at 8; ACB Reply Comments to *October Public Notice* at 22.

[599] *Accessibility NPRM,* 26 FCC Rcd at 3175, ¶ 115. We note that some in industry expressed concern about incorporating parts of the Access Board Draft Guidelines as prospective guidelines. *See, e.g.,* CTIA PN Comments at 12, finding that the Access Board Draft Guidelines were "insufficiently clear to provide useful guidance" and "did not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies."

[600] *Accessibility NPRM,* 26 FCC Rcd at 3175, ¶ 115.

[601] CEA Comments at 38; CEA Reply Comments at 18; 47 U.S.C. § 617(e)(2). *See also* TIA Comments at 32-33. *But see* CTIA Sept. 30 *Ex Parte* at 1 (stating that "it would be contrary to the intent of the statute to subject manufacturers and service providers to an entirely new enforcement regime for services and equipment developed before the Commission articulated a clear set of guidelines for compliance.")

does not need to create a separate advisory group to generate prospective guidelines.[602] We believe that the Access Board will take into account the "needs of specific disability groups, such as those with moderate to severe mobility and speech disorders."[603] Accordingly, we will conduct further rulemaking to develop the required prospective guidelines after the Access Board issues its Final Guidelines.

### E. Section 717 Recordkeeping and Enforcement

#### 1. Recordkeeping

219. *Background.* Section 717(a)[604] requires the Commission to establish new recordkeeping and enforcement procedures for manufacturers and service providers that are subject to Sections 255, 716, and 718 of the Act.[605] Section 717(a)(5)(A) requires such manufacturers and service providers to "maintain, in the ordinary course of business and for a reasonable period, records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718, including the following: (i) Information about the manufacturer's or provider's efforts to consult with individuals with disabilities. (ii) Descriptions of the accessibility features of its products and services. (iii) Information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access."[606] The statute establishes a one-year period for phasing in the recordkeeping requirements (*i.e.*, the recordkeeping requirement starts one year after the effective date of the rule),[607] as well as an annual certification of compliance requirement.[608] It also extends a statutory right to confidentiality to cover those records that our rules require a manufacturer or service provider to keep and produce and that are relevant to an informal complaint.[609] In the *Accessibility NPRM*, the Commission sought comment on implementation of the statutory requirement.

220. *Discussion.* In this *Report and Order*, we adopt rules to implement Congress's directive that manufacturers and service providers maintain "records of the efforts taken by such manufacturer or provider to implement Sections 255, 716, and 718."[610] Specifically, we require covered entities to keep the three sets of records specified in the statute.[611] However, we remind covered entities that do not make their products or services accessible and claim as a defense that it is not achievable for them to do so, that they bear the burden of proof on this defense.[612] As a

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[602] IT and Telecom RERCs Comments at 39.

[603] Words+ and Compusult Comments at 33.

[604] 47 U.S.C. § 618(a).

[605] 47 U.S.C. §§ 255, 617, 619.

[606] 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

[607] *Accessibility NPRM,* 26 FCC Rcd at 3178-79, ¶ 123.

[608] *Accessibility NPRM,* 26 FCC Rcd at 3176, ¶ 117.

[609] 47 U.S.C. § 618(a)(5)(C).

[610] 47 U.S.C. § 618(a)(5)(A).

[611] 47 U.S.C. § 618(a)(5)(A)(i)-(iii).

[612] *See, e.g.*, AFB Comments at 7 ("[T]he plain meaning of the CVAA is that a covered entity has the burden of proof in demonstrating that it was/is not achievable to afford access to people with disabilities in a given context.").

result, while we do not require manufacturers and service providers that intend to make such a claim to create and maintain any particular records relating to that claim, they must be prepared to carry their burden of proof.[613] Conclusory and unsupported claims are insufficient and will cause the Commission to rule in favor of complainants that establish a *prima facie* case that a product or service is inaccessible and against manufacturers or service providers that assert, without proper support, that it was not achievable for them to make their product or service accessible.

221. In this regard, manufacturers and service providers claiming as a defense that it is not achievable must be prepared to produce sufficient records demonstrating:

- the nature and cost of the steps needed to make equipment and services accessible in the design, development, testing, and deployment process[614] to make a piece of equipment or software in the case of a manufacturer, or service in the case of a service provider, usable by individuals with disabilities;[615]
- the technical and economic impact on the operation of the manufacturer or provider and on the operation of the specific equipment or service in question, including on the development and deployment of new communications technologies;
- the type of operations of the manufacturer or service provider; and,
- the extent to which the service provider or manufacturer in question offers accessible services or equipment containing varying degrees of functionality and features, and offered at differing price points.[616]

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[613] This is consistent with the Commission's approach set forth in the *Section 255 Report and Order*. In the *Section 255 Report and Order*, the Commission declined to delineate specific documentation requirements for the "readily achievable" analysis, but stated that it "fully expect[ed]" covered entities to maintain records of their efforts during the ordinary course of business that could be presented to the Commission to demonstrate compliance. *Section 255 Report and Order*, 16 FCC Rcd at 6448, ¶ 74. Likewise, while the Section 255 "readily achievable" factors differ from the "achievable" factors set out in the CVAA, manufacturers and service providers subject to Section 255 claiming such a defense bear the burden of proof under the factors set out in the *Section 255 Report and Order* and our rules. *See Section 255 Report and Order*, 16 FCC Rcd at 6439-40, ¶ 48; *see also* 47 C.F.R. § 7.3(h).

[614] Expert affidavits, attesting that accessibility for a product or service was not achievable, created after a complaint is filed or the Commission launches its own investigation would not satisfy this burden. Samuelson-Glushko TLPC argues that "[u]ser testing requirements are vital to ensure usable and viable technology access to citizens with disabilities." Samuelson-Glushko Reply Comments at 4. While we will not impose specific user testing requirements, we support the practice of user testing and agree with Samuelson-Glushko that user testing benefits individuals with a wide range of disabilities. Samuelson-Glushko Reply Comments at 4-5.

[615] While we do not define here what cost records a covered entity should keep, in reviewing a defense of not achievable, we will expect such entities to produce records that will assist the Commission in identifying the incremental costs associated with designing, developing, testing, and deploying a particular piece of equipment or service with accessibility functionality versus the same equipment or service without accessibility functionality. Additionally, with respect to services, covered entities should be prepared to produce records that identify the average and marginal costs over the expected life of such service. Records that front load costs to demonstrate that accessibility was not achievable will be given little weight.

[616] 47 U.S.C. §§ 617(g)(1)-(4).

222. Likewise, equipment manufacturers and service providers that elect to satisfy the accessibility requirements using third-party applications, peripheral devices, software, hardware, or customer premises equipment must be prepared to produce relevant documentation.[617]

223. We will not mandate any one form for keeping records (*i.e.*, we adopt a flexible approach to recordkeeping). While we establish uniform recordkeeping and enforcement procedures for entities subject to Sections 255, 716, and 718, we believe that covered entities should not be required to maintain records in a specific format.[618] Allowing covered entities the flexibility to implement individual recordkeeping procedures takes into account the variances in covered entities (*e.g.*, size, experience with the Commission), recordkeeping methods, and products and services covered by the provisions.[619]

224. While we are not requiring entities to adopt a standard approach to recordkeeping, we fully expect that entities will establish and sustain effective internal procedures for creating and maintaining records that demonstrate compliance efforts and allow for prompt response to complaints and inquiries. As noted in the *Section 255 Report and Order*, if we determine that covered entities are not maintaining sufficient records to respond to Commission or consumer inquiries, we will revisit this decision.[620]

225. The statute requires manufacturers and service providers to preserve records for a "reasonable time period."[621] Pursuant to this requirement, we adopt a rule that requires a covered entity to retain records for a period of two years from the date the covered entity ceases to offer or in anyway distribute (through a third party or reseller) the product or service to the public. In determining what constitutes a reasonable time period, we believe that records should at a minimum be retained during the time period that manufacturers and providers are offering the applicable products and services to the public. We also believe that a reasonable time period should be linked to the life cycle of the product or service and that covered entities should retain records for a reasonable period after they cease to offer a product or service (or otherwise

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[617] Sections 617(a)(2)(B) and (b)(2)(B) allow manufactures and service providers, respectively, to use third party applications, peripheral devices, software, hardware, or customer premises equipment to satisfy their accessibility requirements, provided they can be accessed by individuals with disabilities and are available at nominal cost.

[618] While we are not requiring that records and documents be kept in any specific format, we exercise our authority and discretion under Sections 403, 4(i), 4(j), 208 and other provisions of the Act and Commission and court precedent to require production of records and documents in an informal and formal complaint process or in connection with investigations we initiate on our own motion in any form that is conducive to the dispatch of our obligation under the Act, including electronic form and formatted for specific documents review software products such as Summation, as well as paper copies. In addition, we require that all records filed with the Commission be in the English language. Where records are in a language other than English, we require the records to be filed in the native language format accompanied by a certified English translation. We adopt our proposal in the *Accessibility NPRM* that if a record that a covered entity must produce "is not readily available, the covered entity must provide it no later than the date of its response to the complaint." *Accessibility NPRM*, 26 FCC Rcd at 3178-79, ¶ 123.

[619] *Accessibility NPRM*, 26 FCC Rcd at 3178-79, ¶ 123. In the *Section 255 Report and Order*, the Commission also declined to mandate specific efforts or formats for the information collection, and instead held that "companies should have flexibility in addressing this issue." *Section 255 Report and Order*, 16 FCC Rcd at 6482, ¶ 172.

[620] *Section 255 Report and Order*, 16 FCC Rcd at 6482, ¶ 172.

[621] 47 U.S.C. § 618(a)(5)(A).

distribute a product or service through a reseller or other third party). In this regard, based on our experience with other enforcement issues, we note that purchasers of products or services might not file a complaint for up to a year after they have purchased such products or services and that the statute places no limitation preventing consumers from doing this. In addition, some consumers might purchase a product or service from another party one year after that the covered entity has ceased making and offering the covered product or service. These "resale" consumers in turn might take up to an additional year to file an accessibility complaint. At the same time, as discussed further in our Enforcement Section below, the Commission may initiate an enforcement investigation into an alleged violation of Section 255, 716, or 718 based on information that a consumer, at any time, brings to the Commission's attention. These documents would thus be relevant to a Commission-initiated investigation. For these reasons, we find that covered entities must retain records for two years after they cease offering (or in any way distributing) a covered product or service to the public.

226. This will enable consumers to file complaints and the Commission to initiate its own investigations to ensure that, even if the product or service at issue in the complaint is not compliant, the next generation or iteration of the product or service is compliant. Because covered entities must comply with Sections 255, 716, and 718, we find that this two-year document retention rule imposes a minimal burden on covered entities because it ensures that they have the necessary documentation to prove that they have satisfied their legal obligations in response to any complaint filed. Covered entities are reminded, however, that, even upon the expiration of the mandatory two-year document retention rule, it is incumbent on them to prove accessibility or that accessibility was not achievable in the event that a complaint is received. Thus, covered entities should use discretion in setting their record retention policies applicable to the post-two-year mandatory record retention period.

227. The statute requires that an officer of a manufacturer or service provider annually submit to the Commission a certification that records required to be maintained are being kept in accordance with the statute.[622] We adopt a rule requiring manufacturers and service providers to have an authorized officer sign and file with the Commission the annual certification required pursuant to Section 717(a)(5)(B) and our rules.[623] The certification must state that the manufacturer or service provider, as applicable, is keeping the records required in compliance with Section 717(a)(5)(A) and section 14.31 of our new rules and be supported with an affidavit or declaration under penalty of perjury, signed and dated by the authorized officer of the company with personal knowledge of the representations provided in the company's certification, verifying the truth and accuracy of the information therein. All such declarations must comply with section 1.16 of our rules and be substantially in the form set forth therein.[624] We also require the certification to identify the name and contact details of the person or persons within the company that are authorized to resolve complaints alleging violations of our accessibility rules and Sections 255, 716, and 718 of the Act, and the name and contact details of the person in the company for purposes of serving complaints under Part 14, Subpart D of our new rules.[625]

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[622] 47 U.S.C. § 618(a)(5)(B).

[623] 47 U.S.C. § 618(a)(5)(B). If the manufacturer or service provider is an individual, the individual must sign. In the case of a partnership, one of the partners must sign on behalf of the partnership and by a member with authority to sign in cases where the manufacturer or service provider is, for example, an unincorporated association or other legal entity that does not have an officer or partner, or its equivalent.

[624] *See* 47 C.F.R. § 1.16.

[625] The contact details required for purposes of complaints and service must be the U.S. agent for service for the covered entity. This information will be posted on the FCC's website.

Finally, the annual certification must be filed with the Commission on or before April 1st each year for records pertaining to the previous calendar year.[626]

228. Section 717(a)(5)(C) requires the Commission to keep confidential only those records that are: (1) filed by a covered entity at the request of the Commission in response to a complaint; (2) created or maintained by the covered entity pursuant to the rules we adopt today; and (3) directly relevant to the equipment or service that is the subject of the complaint.[627] Section 717(a)(5)(C) does not require *all* records that the Commission may request a covered entity file in response to a complaint be kept confidential – only those records that the covered entity is required to keep pursuant to our rules adopted herein *and* are directly relevant to the equipment or service at issue. Section 717(a)(5)(C) also does not protect any additional materials such as supporting data or other information that proves the covered entity's case, nor does it protect records that covered entities are required to keep when responding to a Commission investigation initiated on our own motion.

229. While we recognize the limited scope of the confidentiality protection of Section 717(a)(5)(C), we also recognize that some of the documents falling outside that protection may also qualify for confidentiality under our rules. For those documents submitted in response to a complaint or an investigation, covered entities should follow our existing rules and procedures for protecting confidentiality of records. Accordingly, when a covered entity responds to a complaint alleging a violation of Section 255, 716, or 718 or responds to a Commission inquiry, the covered entity may request confidential treatment of the documentation, information, and records that it files with the Commission under section 0.459 of our rules.[628] When covered entities file records that fall within the limited scope of Section 717(a)(5)(C), they may assert the statutory exemption from disclosure under section 0.457(c) of the Commission's rules.[629] In all other cases, covered entities must comply with section 0.459 when seeking protection of their records.[630]

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[626] CGB will issue a public notice to provide filing instructions prior to the first annual certification, which may be required on or before April 1, 2013. For the first certification filing, manufacturers and service providers must certify that, since the effective date of the rules, records have been kept in accordance with the Commission's rules. CGB will establish a system for online filing of annual certifications. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how annual certifications may be filed.

[627] 47 U.S.C. § 618(a)(5)(C).

[628] 47 C.F.R. § 0.459.

[629] 47 C.F.R. § 0.457(c). By adopting this process, we see no need to adopt TIA's proposal that we specifically amend Section 0.457(c) to include Section 717(a)(5)(C) materials. Letter from Mark Uncapher, Director, TIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 3 (filed Aug. 26, 2011). We require covered entities to include with their confidentiality requests under Section 0.459 a statement identifying which records, if any, it is asserting a statutory protection under Section 618(a)(5)(C) and to submit a redacted version of these records for the public file together with redacted versions of the documents and information it requests confidential treatment under section 0.459.

[630] *See* 47 C.F.R. § 0.459. We remind covered entities that our rules require such entities to file a redacted copy of their response to a complaint or investigation. We do not believe it serves the public interest of the parties in a complaint process for the Commission to try to determine in the first instance what documents and records the filing party wishes be kept confidential. The party filing documents with the Commission is best suited to make that initial determination. We note that our informal complaint rules require the responding covered entity to serve a non-confidential summary of its complaint answer to the complainant. *See* Informal Complaints, Section III.E.2.c, *infra*.

230. Finally, as discussed earlier in this *Report and Order,* products or services offered in interstate commerce shall be accessible, unless not achievable, beginning on October 8, 2013.[631] Pursuant to the statute, one year after the effective date of these regulations, covered entities' recordkeeping obligations become effective.[632]

### 2. Enforcement

#### a. Overview

231. Section 717 of the Act requires the Commission to adopt rules that facilitate the filing of formal and informal complaints alleging non-compliance with Section 255, 716, or 718 and to establish procedures for enforcement actions by the Commission with respect to such violations, within one year of enactment of the law.[633] In crafting rules to implement the CVAA's enforcement requirements, our goal is to create an enforcement process that is accessible and fair and that allows for timely determinations, while allowing and encouraging parties to resolve matters informally to the extent possible.

#### b. General Requirements

232. *Background.* In the *Accessibility NPRM,* the Commission sought comment on whether to require potential complainants to first notify the defendant manufacturer or provider of their intent to file a complaint with the Commission based on an alleged violation of one or more provisions of Section 255, 716, or 718.[634] The Commission invited proposals on potential safeguards that the Commission could adopt to ensure that any pre-filing requirement established under the new rules is not onerous on potential complainants.[635] In addition, the Commission proposed in the *Accessibility NPRM* not to adopt a standing requirement in order to file a formal or informal complaint under Section 255, 716, or 718.[636]

233. *Discussion.* Several commenters suggest that a type of pre-filing notice to potential defendants may facilitate the speedy settlement of consumer disputes, which, they say, would save consumers and industry time and money and preserve Commission resources that would otherwise be expended in the informal complaint process.[637] These commenters urge the Commission to require potential complainants to notify covered entities of their intent to file an informal complaint generally 30 days before they intend to file such a complaint.[638] Others,

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[631] *See* Phased in Implementation, Section III.A.5, *supra.*

[632] 47 U.S.C. § 618(a)(5)(A).

[633] 47 U.S.C. § 618(a).

[634] *Accessibility NPRM,* 26 FCC Rcd at 3181-82, ¶ 128.

[635] *Accessibility NPRM,* 26 FCC Rcd at 3181-82, ¶ 128.

[636] *Accessibility NPRM,* 26 FCC Rcd at 3181-82, ¶ 130.

[637] *See* AT&T Comments at 13-14 (arguing that the "vast majority of complaints" may be resolved before they reach the Commission); CEA Comments at 31-32; CTIA Comments at 31-32 (encouraging the Commission to "foster an environment that facilitates greater communication among the parties and informal resolution of concerns wherever possible"). *See also Section 255 Report and Order,* 16 FCC Rcd at 6467, ¶ 119 (encouraging consumers to raise their concerns with manufacturers or service providers prior to filing a Section 255 complaint).

[638] AT&T Comments at 13-14 (should require a 30 day pre-filing notice); CEA Comments at 31-32 (should require an unspecified pre-filing notice period); CTIA Comments at 31-32 (should require a 30 day pre-filing notice period); TechAmerica Comments at 10 (arguing that "the Commission should encourage, if (continued....)

however, have reported that consumers would experience frustration if required to pre-notify a covered entity directly.[639] We recognize the potential benefits of allowing companies an opportunity to respond directly to the concerns of consumers before a complaint is filed. At the same time, we are cognizant of the difficulties that consumers may have in achieving resolution of their issues on their own. For example, consumers may not always be able to figure out, in multi-component products that use communications services, which entity is responsible for failing to provide access.[640] Therefore, to facilitate settlements, as well as to assist consumers with bringing their concerns to the companies against which they might have a complaint, we adopt a compromise pre-filing requirement that is designed to reap the benefits of informal dispute resolution efforts, but that does not impose an unreasonable burden on consumers by requiring them to approach companies on their own.

234. We will require consumers to file a "Request for Dispute Assistance" ("Request") with CGB, rather than with a covered entity, prior to filing an informal complaint with the Commission.[641] This requirement to file a Request is a prerequisite to the filing of informal complaints only. It is not a prerequisite to the filing of a formal complaint, as the complainant and the respondent to a formal complaint proceeding are both required to certify in their pleadings that, prior to the filing of the formal complaint, both parties, "in good faith, discussed or attempted to discuss the possibility of settlement."[642]

235. This Request should contain: (1) the name, address, e-mail address, and telephone number of the consumer and the manufacturer or service provider against whom the complaint will be made;[643] (2) an explanation of why the consumer believes the manufacturer or provider is in violation of Sections 255, 716, or 718 of the Commission's implementing rules, including details regarding the service or equipment and the relief requested and any documentation that supports the complainant's contention; (3) the approximate date or dates on which the consumer either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service in question; (4) the consumer's preferred format or method of response to the complaint by the Commission and defendant (*e.g.*, letter, facsimile transmission,

(Continued from previous page) ———————————
not require, potential complainants" to notify potential respondents of an intent to file a complaint); Letter from Mark Uncapher, Director, TIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2 (filed Sept. 12, 2011) ("TIA Sept. 12 *Ex Parte*"); TIA Sept. 28 *Ex Parte* at 2 (arguing that consumers and covered entities should have 60 days to resolve a dispute before an informal complaint is filed).

[639] IT and Telecom RERCs Comments at 39-40 ("[A pre-filing requirement] can lead to frustration and giving up on pursuing the complaint.").

[640] *See* IT and Telecom RERCs Comments at 39-40.

[641] A Request for Dispute Assistance may be sent to CGB in the same manner as an informal complaint, as discussed below, but filers should use the e-mail address dro@fcc.gov if sending their complaint by e-mail. Parties with questions regarding these requests should call CGB at 202-418-2517 (voice), 202-418-2922 (TTY), or visit the Commission's Disability Rights Office web site at http://transition.fcc.gov/cgb/dro. CGB will establish a system for online filing of requests for dispute assistance. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how requests for dispute assistance may be filed.

[642] *See* Appendix B, 47 C.F.R. §§ 14.39(a)(8), 14.42(h).

[643] Where the consumer does not have all of this information or cannot identify the appropriate manufacturer or service provider, he or she should provide as much information as possible and work with CGB to identify the appropriate covered entity and its contact information.

telephone (voice/TRS/TTY), e-mail, or some other method that will best accommodate the consumer's disability); and (5) any other information that may be helpful to CGB and the defendant to understand the nature of the complaint.

236. CGB will forward a copy of the request to the named manufacturer or service provider in a timely manner. As discussed in the Recordkeeping Section above, we require covered entities to include their contact information in their annual certifications filed with the Commission.[644] If a covered entity has not filed a certification that includes its contact information,[645] CGB shall forward the request to the covered entity based on publicly available information, and the covered entity may not argue that it did not have a sufficient opportunity to settle a potential complaint during the dispute assistance process. If, in the course of the CGB dispute assistance process, CGB or the parties learn that the Requester has identified the wrong entity or there is more than one covered entity that should be included in the settlement process, then CGB will assist the parties in ascertaining and locating the correct covered entity or entities for the dispute at issue. In this case, the 30-day period will be extended for a reasonable time period, so that the correct covered entities have notice and an opportunity to remedy any failure to make a product or service achievable or to settle the dispute in another manner.

237. Once the covered entity receives the Request, CGB will then assist the consumer and the covered entity in reaching a settlement of the dispute with the covered entity. After 30 days, if a settlement has not been reached, the consumer may then file an informal complaint with the Commission. However, if the consumer wishes to continue using CGB as a settlement resource beyond the 30-day period, the consumer and the covered entity may mutually agree to extend the CGB dispute assistance process for an additional 30 days and in 30-day increments thereafter.[646] Once a consumer files an informal complaint with the Enforcement Bureau, as discussed below, the Commission will deem the CGB dispute assistance process concluded.[647]

238. In the course of assisting parties to resolve a Section 716 dispute, CGB may discover that the named manufacturer or service provider is exempt from Section 716 obligations under a waiver or the temporary small business exemption.[648] In such cases, CGB will inform the consumer why the named covered entity has no responsibility to make its service or product accessible, and the dispute assistance process will terminate.

239. We believe that this dispute assistance process provides an appropriate amount of time to facilitate settlements and provide assistance to consumers to rapidly and efficiently

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[644] Recordkeeping, Section III.E.1, *supra*. *See* Appendix B, 47 C.F.R. § 14.31(b).

[645] Failure to file a certification is a violation of the Commission's rules. *See* Appendix B, 47 C.F.R. § 14.31(b).

[646] We find that this is a better approach than the strict 60-day period recommended by TIA (*see* TIA Sept. 12 *Ex Parte* and TIA Sept. 28 *Ex Parte*) because it will encourage more expeditious resolutions while providing greater flexibility to the consumer and the covered entity to continue negotiations on an as needed basis.

[647] As discussed in Informal Complaints, Section III.E.2.c, *infra*, an informal complainant will be required to certify that it filed a "Request for Dispute Assistance" and to provide the date on which such request for filed.

[648] *See* Exemptions for Small Entities – Temporary Exemption of Section 716 Requirements, Section III.C.3, *supra*.

resolve accessibility issues with covered entities.[649] We also believe that this approach will lessen the hesitation of some consumers to approach companies about their concerns or complaints by themselves. Commission involvement before a complaint is filed will benefit both consumers and industry by helping to clarify the accessibility needs of consumers for the manufacturers or service providers against which they may be contemplating a complaint, encouraging settlement discussions between the parties, and resolving accessibility issues without the expenditure of time and resources in the informal complaint process.

240. No parties opposed the Commission's proposal not to adopt a standing requirement or its proposal to continue taking *sua sponte* enforcement actions. The language of the statute supports no standing requirement, stating that "[a]ny person alleging a violation . . . may file a formal or informal complaint with the Commission."[650] We believe that any person should be able to identify noncompliance by covered entities and anticipate that informal or formal complaints will be filed by a wide range of complainants, including those with and without disabilities and by individuals and consumer groups.[651] Therefore, we find no reason to establish a standing requirement and adopt the *Accessibility NPRM*'s proposal on standing to file. We also find no reason to modify existing procedures for initiating, on our own motion, Commission and staff investigations, inquiries, and proceedings for violations of our rules and the Act. Irrespective of whether a consumer has sought dispute assistance or filed a complaint on a particular issue, we intend to continue using all our investigatory and enforcement tools whenever necessary to ensure compliance with the Act and our rules.

### c. Informal Complaints

241. *Background.* Section 717(a) of the Act requires, in part, that the Commission adopt rules governing the filing of informal complaints that allege violations of Sections 255, 716, or 718, and to establish procedures for enforcement actions by the Commission for any such violations, including for filing complaints and answers, consolidation of substantially similar complaints, timelines for conducting investigations and issuing findings, and remedies.[652]

242. In the *Accessibility NPRM*, the Commission proposed a minimum set of requirements for complainants to include in their informal complaints.[653] The Commission stated that the proposed requirements are consistent with its current Section 255 rules and with informal

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[649] TIA Aug. 26 *Ex Parte* at 2 (arguing that a pre-complaint, CGB-facilitated process will permit consumers and covered entities to resolve disputes on their own); Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2-3 n.10 (filed Sept. 6, 2011) ("CEA Sept. 6 *Ex Parte*") (expressing general support for TIA's CGB proposal); *see* Letter from Matthew Gerst, Counsel, CTIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, Attachment at 12 (filed Aug. 11, 2011) ("CTIA Aug. 11 *Ex Parte*") (stating that "[e]arly resolution among parties should be encouraged").

[650] 47 U.S.C. § 618(a)(3)(A).

[651] As noted in the *Accessibility NPRM*, there is no standing requirement under Sections 255, 617, and 619 or under Section 208 of the Act and our existing rules. *See Accessibility NPRM*, 26 FCC Rcd at 3182-83, ¶ 130. *See also Section 255 Report and Order*, 16 FCC Rcd at 6469, ¶ 125 (also noting that Section 208, Section 255, and the complaint rules do not include a standing requirement); IT and Telecom RERCs Comments at 40 (agreeing that there is no basis in law for imposing a standing requirement); Words+ and Compusult Comments at 35 (opposing any standing requirement).

[652] 47 U.S.C. § 618(a)(1)-(4).

[653] *Accessibility NPRM,* 26 FCC Rcd at 3183, ¶ 136.

complaint provisions that the Commission has adopted in other contexts.[654]

243. *Discussion.* In crafting rules to govern informal accessibility complaints, we have first examined the requirements of the CVAA, especially our obligation to undertake an investigation to determine whether a manufacturer or service provider has violated core accessibility requirements. While the investigation is pending, the CVAA also encourages private settlement of informal complaints, which may terminate the investigation.[655] When a complaint is not resolved independently between the parties, however, the Commission must issue an order to set forth and fully explain the determination as to whether a violation has occurred.[656] Further, if the Commission finds that a violation has occurred, a defendant manufacturer or service provider may be directed to institute broad remedial measures that have implications and effects far beyond an individual complainant's particular situation, as in an order by the Commission to make accessible the service or the next generation of equipment.[657] Finally, the CVAA requires that the Commission hold as confidential certain materials generated by manufacturers and service providers who may be defendants in informal complaint cases.[658] In addition to these statutory imperatives, we have also carefully considered the comments filed in this proceeding as well as our existing rules that apply to a variety of informal complaints.

244. Taking these factors into account, together with the complexity of issues and highly technical nature of the potential disputes that we are likely to encounter in resolving complaints, the rules we adopt here attempt to balance the interests of both industry and consumers. In this regard, we seek, as much as possible, to minimize the costs and burdens imposed on these parties while both encouraging the non-adversarial resolution of disputes and ensuring that the Commission is able to obtain the information necessary to resolve a complaint in a timely fashion. We discuss these priorities more fully below and set forth both our pleading requirements and the factors that we believe are crucial to our resolution of informal accessibility complaints.

245. We find the public interest would be served by adopting the minimum requirements identified by the Commission in the *Accessibility NPRM* for informal complaints.[659] Specifically, the rules we adopt today will require informal complaints to contain, at a minimum: (1) the name, address, e-mail address, and telephone number of the complainant, and the manufacturer or service provider defendant against whom the complaint is made; (2) a complete statement of facts explaining why the complainant contends that the defendant manufacturer or provider is in violation of Sections 255, 716, or 718, including details regarding the service or

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[654] 47 C.F.R. §§ 1.617 – 1.619 (informal complaints against common carriers); 47 C.F.R. § 1.719 (informal complaints regarding unauthorized changes in subscriber carrier selections); 47 C.F.R. §§ 6.17 - 6.20, 7.17 - 7.20 (informal disabilities complaints under Section 255); 47 C.F.R. §§ 68.417 – 68.420 (informal complaints regarding hearing aid compatibility).

[655] 47 U.S.C. § 618(a)(8) ("Nothing in the Commission's rules or this Act shall be construed to preclude a person who files a complaint and a manufacturer or provider from resolving a formal or informal complaint prior to the Commission's final determination in a complaint proceeding. In the event of such a resolution, the parties shall jointly request dismissal of the complaint and the Commission shall grant such request.").

[656] 47 U.S.C. § 618(a)(3)(B).

[657] 47 U.S.C. § 618(a)(3)(B)(i).

[658] 47 U.S.C. § 618(a)(5)(C).

[659] We also include an additional certification requirement related to our new Dispute Assistance Program. *See* General Requirements, Section III.E.2.b, *supra*.

equipment and the relief requested and all documentation that supports the complainant's contention; (3) the date or dates on which the complainant or person on whose behalf the complaint is being filed either purchased, acquired, or used (or attempted to purchase, acquire, or use) the equipment or service about which the complaint is being made; (4) a certification that the complainant submitted to the Commission a Request for Dispute Assistance no less than 30 days before the complaint is filed and the date that the Request was filed; (5) the complainant's preferred format or method of response to the complaint by the Commission and defendant (*e.g.*, letter, facsimile transmission, telephone (voice/TRS/TTY), e-mail, audio-cassette recording, Braille, or some other method that will best accommodate the complainant's disability, if any); and (6) any other information that is required by the Commission's accessibility complaint form.

246. The minimum requirements we adopt today for informal complaints are aligned with our existing informal complaint rules and the existing rules governing Section 255 complaints and take into account our statutory obligations under the CVAA. They will allow us to identify the parties to be served, the specific issues forming the subject matter of the complaint, and the statutory provisions of the alleged violation, as well as to collect information to investigate the allegations and make a timely accessibility achievability determination. Further, we believe that these requirements create a simple mechanism for parties to bring legitimate accessibility complaints before the Commission while deterring potential complainants from filing frivolous, incomplete, or inaccurate complaints. Accordingly, we decline to relax or expand the threshold requirements for informal accessibility complaints as advocated by some commenters.[660]

247. As the Commission noted in the *Accessibility NPRM*, complaints that do not satisfy the pleading requirements will be dismissed without prejudice to re-file.[661] We disagree with AFB that the Commission should work with a complainant to correct any errors before dismissing a defective complaint.[662] Under the statute and the rules we adopt today, the complainant in an informal complaint process is a party to the proceeding. The informal complaint proceeding is triggered by the filing of the informal complaint.[663] Once the proceeding is initiated, the Commission's role is one of impartial adjudicator – not of an advocate for either the complainant or the manufacturer or service provider that is the subject of the complaint. While we will dismiss defective complaints once filed, we agree with commenters that consumers may need some assistance *before* filing their complaints.[664] Toward that end, consumers may

[660] *See, e.g.*, CTIA Comments at 34; IT and Telecom RERCs Comments at 41.

[661] *Accessibility NPRM,* 26 FCC Rcd at 3183, ¶ 136. *See* CEA Sept. 6 *Ex Parte* at 3 (arguing that Commission staff should have discretion to dismiss complaints that are deficient on their face).

[662] *See* AFB Reply Comments at 14. In fact, we hope that a majority of consumer issues can be resolved through the dispute assistance process and thereby alleviate the need for consumers to file a complaint at all. *See* General Requirements, Section III.E.2.b, *supra.*

[663] *See* 47 U.S.C. § 618(a)(3)(B).

[664] One commenter suggests that it may be difficult for consumers to obtain addresses for potential defendants as required by our rules. AFB Reply Comments at 14 (complainants should be required to provide only the name of the manufacturer and/or service provider and, "if possible," its city and state or country for foreign entities). All manufacturers and service providers subject to Sections 255, 716, and 718 are required to file with the Commission, and regularly update their business address and other contact information. Consumers, therefore, should have a simple means of obtaining this required information. Finally, the Commission may modify content requirements when necessary to accommodate a complainant whose disability may prevent him from providing information required under our rules. *Section 255 Report and Order,* 16 FCC Rcd at 6468-69, ¶ 123.

contact the Commission's Disability Rights Office by sending an e-mail to dro@fcc.gov; calling 202-418-2517 (voice) or 202-418-2922 (TTY), or visiting its website at http://transition.fcc.gov/cgb/dro with any questions regarding where to find contact information for manufacturers and service providers, how to file an informal complaint, and what the complaint should contain.

248. By making the Commission's Disability Rights Office available to consumers with questions, and by carefully crafting the dispute assistance process,[665] we believe that we have minimized any potential minimal burdens that an informal complaint's content requirements may impose on consumers.[666] After a consumer has undertaken the dispute assistance process, CGB and the parties should have identified the correct manufacturer or service provider that the consumer will name in the informal complaint.[667] Indeed, by the conclusion of the dispute assistance process, a consumer should have obtained all the information necessary to satisfy the minimal requirements of an informal complaint.

249. We decline to adopt a requirement suggested by some commenters that consumers be either encouraged or compelled to disclose the nature of their disability in an informal complaint.[668] Nothing in the statute or the rules we adopt today limits the filing of informal complaints to persons with disabilities or would prevent an advocacy organization, a person without disabilities, or other legal entity from filing a complaint.[669] Thus, not every informal accessibility complaint will necessarily be filed by an individual with a disability. Further, imposing or even suggesting such a disclosure could have privacy implications and discourage some persons from filing otherwise legitimate complaints. To the extent that a particular disability is relevant to the alleged inaccessibility of a product or service, the complainant is free to choose whether to disclose his or her disability in the statement of facts explaining why the complainant believes the manufacturer or service provider is in violation of Section 255, 716, or 718.[670]

250. We also decline to permit consumers to assert anonymity when filing informal accessibility complaints. One commenter suggests that such a procedure should be made

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[665] *See* General Requirements, Section III.E.2.b, *supra.*

[666] Some commenters argue generally that the *NPRM's* proposed complaint content requirements impose a burden on consumers. *See, e.g.*, IT and Telecom RERC Comments at 41; AFB Reply Comments at 13-14.

[667] Some commenters argue that the consumer may not be able to identify which covered entity is responsible for ensuring accessibility. *See* Words+ and Compusult Comments at 36 ("Often the consumer does not make the distinct[ion] between the specific phone and the service provided by the service provider. In fact, many phones are branded by the service provider such that only the most knowledgeable consumer would know who the manufacturer of their device is."); AFB Reply Comments at 13-14 (consumers frequently are unaware of the manufacturer of the products they use for communications).

[668] T-Mobile Comments at 15 (Commission should require complainants "to describe with specificity the disability that prompts the complaint and the relief requested"); Words+ and Compusult Comments at 36 (suggesting that such disclosure, although potentially beneficial, should be optional); CEA Reply Comments at 21.

[669] *See e.g.* General Requirements, Section III.E.2.b, *supra* (declining to attach any standing requirement to informal or formal accessibility complaints).

[670] In this regard, we agree that it is sufficient for a complainant to describe the alleged inaccessibility in simple and functional terms such as "I can hear my phone's e-mail menu choices, but my phone won't read my e-mail aloud to me no matter what I do." AFB Reply Comments at 14.

available to complainants who may be concerned about retaliation.[671] Anonymity would preclude the complainant from playing an active role in the adjudicatory process and prevent informal contacts and negotiated settlement between parties to resolve an informal complaint filed with the Commission – a possibility clearly favored by the CVAA.[672] We recognize, however, that some consumers who wish to remain anonymous may have valuable information that could prompt the Commission to investigate, on its own motion, a particular entity's compliance with Section 255, 716, or 718. We wish to encourage those consumers who do not want to file a complaint with the Commission, for fear of retaliation or other reasons, to provide the Commission with information about non-compliance with Section 255, 716, or 718. To do so, consumers may anonymously apprise the Commission of possible unlawful conduct by manufacturers or service providers with respect to accessibility and compliance with Section 255, 716, or 718.[673] This may trigger an investigation by the Commission on its own initiative, but supplying such information is not tantamount to filing an informal complaint subject to the procedures we adopt today.

251. We also decline to establish deadlines for filing an informal accessibility complaint as requested by one party. Specifically, CTIA contends that complaints should be limited to a specified filing window that is tied to either the initial purchase of the equipment or service or the first instance of perceived inaccessibility.[674] As a preliminary matter, the statute does not impose a "filing window" or "statute of limitations" on the filing of complaints, and we see no reason to adopt such a limit today. Further, we have no information beyond conjecture to suggest that consumers would be likely to use the informal complaint process to bring stale accessibility issues before the Commission.[675] The timeliness with which a complaint is brought may, however, have a bearing on its outcome. Complaints that are brought against products or services that are no longer being offered to the public, for example, may be less likely to bring about results that would be beneficial to complainants.

252. Finally, we do not believe that it is necessary to apply more stringent content requirements to informal complaints. We find unpersuasive the contention that complainants should be required to provide some evidentiary showing of a violation beyond the narrative required by new section 14.34(b) of our new rules.[676] In fact, the primary evidence necessary to assess whether a violation has occurred resides with manufacturers and service providers, not

[671] IT and Telecom RERCs Comments at 41.

[672] *See* 47 U.S.C. § 618(a)(8) (addressing private resolutions of informal complaints and providing that the Commission "shall grant" joint requests for dismissal). Some commenters point to the benefits that accrue to complainants, defendants, and the Commission when accessibility complaints are resolved informally between the parties; AT&T Comments at 13-16; CTIA Comments at 31.

[673] The Commission will issue a public notice that will provide a Commission e-mail address and voice and TTY number for the receipt of information from members of the public relating to possible Section 255, 716, and 718 statutory and rule violations. Consumers may provide such information anonymously. The Commission may use this information to launch its own investigation on its own motion. This process should satisfy the IT and Telecom RERCs' concern that some consumer may wish to provide information but remain anonymous. IT and Telecom RERCs Comments at 41.

[674] CTIA Comments at 35.

[675] The Commission examined this issue previously in connection with the Section 255 complaint rules and found that in bringing informal complaints against common carriers, consumers seldom complained about conduct occurring more that a year prior to the filing of a complaint. *Section 255 Report and Order*, 16 FCC Rcd at 6479, ¶ 153.

[676] CTIA Comments at 34, 37.

with consumers who use their products and services. While a consumer should be prepared to fully explain the manner in which a product or service is inaccessible, inaccessibility alone does not establish a violation. Specifically, a violation exists only if the covered product or service is inaccessible and accessibility was, in fact, achievable. To require that a complaint include evidentiary documentation or analysis demonstrating a violation has occurred would place the complainant in the untenable position of being expected to conduct a complex achievability analysis without the benefit of the data necessary for such an analysis simply in order to initiate the informal complaint process.[677] It is the covered entity that will have the information necessary to conduct such an analysis, not the complainant.

253. While no parties specifically commented on how the Commission should establish separate and identifiable electronic, telephonic, and physical receptacles for the receipt of informal complaints, the Commission has established a process that allows consumers flexibility in the manner in which they choose to file an informal complaint.[678] Informal complaints alleging a violation of Section 255, 716, or 718 may be transmitted to the Commission via any reasonable means, including by the Commission's online informal complaint filing system, U.S. Mail, overnight delivery, or e-mail.[679] We encourage parties to use the Commission's online filing system, because of its ease of use. Informal complaints filed using a method other than the Commission's online system[680] should include a cover letter that references Section 255, 716, or 718 and should be addressed to the Enforcement Bureau. Any party with a question about information that should be included in a complaint alleging a violation of Section 255, 716, or 718 should contact the Commission's Disability Rights Office via e-mail at dro@fcc.gov or by calling 202-418-2517 (voice), 202-418-2922 (TTY).[681]

254. Once we receive a complaint, we will forward those complaints meeting the filing requirements, discussed above, to the manufacturer or service provider named in the

[677] *See* IT and Telecom RERCs Comments at 41 ("[Consumers] simply want an accessible product or service. . . . The Commission is in a far better position to investigate the details of the manufacture and distribution, accessibility and achievability of any given product or service than is the consumer."); AFB Reply Comments at 14 (some consumers may consider themselves unable to fully explain the technical reasons for inaccessibility).

[678] CGB will establish a system for online filing of informal complaints. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how requests for dispute assistance may be filed. Formal complaints must be filed in accordance with Sections 14.38-14.52 of our new rules. *See* Appendix B attached, adopting new section 14.52, 47 C.F.R. § 14.52 ("Copies; service; separate filings against multiple defendants"); Formal Complaints, Section III.E.2.d, *infra* (adopting, with a few modifications, Commission's general Formal Complaint rules for accessibility complaints).

[679] The Commission will issue a public notice announcing the establishment of an Enforcement Bureau e-mail address that will accept informal complaints alleging violations of Section 255, 617 or 619 or the Commission's rules.

[680] The Commission will issue a public notice as soon as its online system is established for filing informal complaints alleging violations of the rules adopted in this *Report and Order*.

[681] *See* AFB Reply Comments at 14-15 ("We believe that the final rule should establish a complaint navigation ombudsman function within the Commission to which consumers can turn for advice on proper form and effective content of both formal and informal complaints.").

complaint.[682] To facilitate service of the complaints on the manufacturer or service provider named in the complaint, we adopt the Commission's proposal to require such entities to disclose points of contact for complaints and inquiries under Sections 255, 716, or 718 in annual certifications. As discussed in greater detail in General Requirements, Section III.E.2.b, *supra,*, failure to file a certification is a violation of our rules. We expect that the parties or the Commission will discover that a covered entity has not filed contact information during the dispute assistance process, that the violation will be remedied during that process, and that the complainant will have the contact information prior to filing a complaint.

255. We believe that requiring such points of contact will facilitate consumers' ability to communicate directly with manufacturers and service providers about accessibility issues or concerns and ensure prompt and effective service of complaints on defendant manufacturers and service providers by the Commission.[683] The contact information must, at a minimum, include the name of the person or office whose principal function will be to ensure the manufacturer or service provider's prompt receipt and handling of accessibility concerns, telephone number (voice and TTY), fax number, and both mailing and e-mail addresses. Covered entities must file their contact information with the Commission in accordance with our rules governing the filing of annual certifications.[684] We intend to make this information available on the Commission's website and also encourage, but do not require, covered entities to clearly and prominently identify the designated points of contact for accessibility matters in, among other places, their company websites, directories, manuals, brochures, and other promotional materials. Providing such information on a company's website may assist consumers in contacting the companies directly and allow them to resolve their accessibility issues, eliminating any need to seek Commission assistance or file a complaint. Because the contact information is a crucial component of the informal complaint process (*i.e.*, service of the complaint on defendants which, in turn, provides defendants with notice and opportunity to respond),[685] we require that the contact information be kept current.[686]

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[682] In some cases the complaint may allege a violation involving both a manufacturer and a service provider and/or multiple manufacturers and service providers. For clarity, we will refer to manufacturers and service providers in the singular and use of the word "or" in the text means "and/or" as applicable to a given complaint.

[683] *See* CTIA Comments at 33; Verizon Comments at 14-15; Words+ and Compusult Comments at 37.

[684] Appendix B, § 14.31(b). See Recordkeeping, Section III.E.1, *supra.* CGB will establish a system for online filing of contact information. When this system is available, CGB will release a public notice announcing this fact and providing instructions on its use. CGB will also update the Disability Rights Office section of the Commission's website to describe how contact information may be filed.

[685] It is critical that the Commission have correct information for service. If the complaint is not served to the correct address, it could delay or prevent the applicable manufacturer or service provider from timely responding. Failure to timely respond to a complaint or order of the Commission could subject a party to sanction or other penalties. *See* 47 U.S.C. § 503(b).

[686] In this regard, whenever the information is no longer correct in any material respect, manufacturers and service providers shall file and update the information within 30 days of any change to the information on file with the Commission. Further, failure to file contact information or to keep such information current will be a violation of our rules warranting an upward adjustment of the applicable base forfeiture under section 1.80 of our rules for "[e]gregious misconduct" and "[s]ubstantial harm." 47 C.F.R. § 1.80(4) Section I (Base Amount for Section 503 Forfeitures) and Section II (Adjustment Criteria for Section 503 Forfeitures). Likewise, the violation will be a "continuous violation" until cured. 47 C.F.R. § 1.80(4) Section II.

256. The CVAA provides that the party that is the subject of the complaint be given a reasonable opportunity to respond to the allegations in the complaint before the Commission makes its determination regarding whether a violation occurred. It also allows the party to include in its answer any relevant information (*e.g.,* factors demonstrating that the equipment or advanced communications services, as applicable, are accessible to and usable by individuals with disabilities or that accessibility is not achievable under the standards set out in the CVAA and rules adopted today).[687] These provisions not only protect the due process rights of defendant manufacturers and service providers in informal complaint cases but also enable the Commission to compile a complete record to resolve a complaint and conduct the required investigation as to whether a violation of Section 255, 716, or 718 has occurred.

257. To implement these provisions of the CVAA, we adopt the Commission's proposal in the *Accessibility NPRM* with one modification[688] and require answers to informal complaints to: (1) be filed with the Commission and served on the complainant within twenty days of service of the complaint, unless the Commission or its staff specifies another time period; (2) respond specifically to each material allegation in the complaint; (3) set forth the steps taken by the manufacturer or service provider to make the product or service accessible and usable; (4) set forth the procedures and processes used by the manufacturer or service provider to evaluate whether it was achievable to make the product or service accessible and usable; (5) set forth the manufacturer's or service provider's basis for determining that it was not achievable to make the product or service accessible and usable; (6) provide all documents supporting the manufacturer's or service provider's conclusion that it was not achievable to make the product or service accessible and usable;[689] (7) include a declaration by an officer of the manufacturer or service provider attesting to the truth of the facts asserted in the answer; (8) set forth any claimed defenses; (9) set forth any remedial actions already taken or proposed alternative relief without any prejudice to any denials or defenses raised; (10) provide any other information or materials specified by the Commission as relevant to its consideration of the complaint; and (11) be prepared or formatted in the manner requested by the Commission and the complainant, unless otherwise permitted by the Commission for good cause shown.[690] We also adopt the Commission's proposal to allow the complainant ten days, unless otherwise directed by the Commission, to file and serve a reply that is responsive to the matters contained in the answer without the addition of new matters.[691] We do not anticipate accepting additional filings.

258. Defendants must file complete answers, including supporting records and documentation, with the Commission within the 20-day time period specified by the Commission. While we agree with those commenters that argue that a narrative answer or

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[687] 47 U.S.C. § 618(a)(4).

[688] We are not requiring defendants to provide the names, titles, and responsibilities of each decision maker in the evaluation process as we initially proposed in the *Accessibility NPRM.* We are, however, preserving our right to request such information on a case-by-case basis.

[689] We anticipate that much of this documentation will be kept confidential in accordance with our recordkeeping rules adopted today. Appendix B, § 14.31(c).

[690] *Accessibility NPRM*, 26 FCC Rcd at 3184, ¶ 138.

[691] One party, while supporting adoption of this provision, urged the Commission to grant extensions of time liberally for replies. Words+ and Compusult Comments at 37-38. While we will carefully consider requests for extensions of time, we emphasize again that extensions of time will not be routinely granted, particularly because of the strict deadline for the Commission's determination.

product design summary would be useful,[692] we disagree that such a response, by itself, is sufficient to allow the Commission to fully investigate and make an accessibility or achievability determination as required by the Act. An answer must comply with all of the requirements listed in the paragraph above and include, where necessary, a discussion of how supporting documents, including confidential documents, support defenses asserted in the answer. We note that, because the CVAA requires that we keep certain of a defendant's documents confidential,[693] we will not require a defendant to serve the complainant a confidential answer that incorporates, and argues the relevance of, confidential documents. Instead, we will require a defendant to file a non-confidential summary of its answer with the Commission and serve a copy on the complainant. The non-confidential summary must contain the essential elements of the answer, including any asserted defenses to the complaint, whether the defendant concedes that the product or service at issue was not accessible, and if so, the basis for its determination that accessibility was not achievable, and other material elements of its answer. The non-confidential summary should provide sufficient information to allow the complainant to file a reply, if he or she so chooses.[694] The Commission may also use the summary to give context to help guide its review of the detailed records filed by the defendant in its answer.

259. We are also adopting the Commission's proposal in the *Accessibility NPRM* to require that defendants include in their answers a declaration by an authorized officer of the manufacturer or service provider of the truth and accuracy of the defense. Such a declaration is not "irrelevant" to whether a manufacturer or service provider has properly concluded that accessibility was not achievable,[695] as it establishes the good faith of the analysis and holds the company accountable for a conclusion that ultimately resulted in an inaccessible product or service. Consistent with requirements for declarations in other contexts, we specify that a declaration here must be made under penalty of perjury, signed and dated by the certifying officer.[696]

260. We are not requiring answers to include the names, titles, and responsibilities of each decisionmaker involved in the process by which a manufacturer or service provider determined that accessibility of a particular offering was not achievable. We agree that such a requirement may be unduly burdensome, given the complexity of the product and service development process.[697] We will, however, reserve our right under the Act to request such information on a case-by-case basis if we determine during the course of an investigation initiated in response to a complaint or our own motion that such information may help uncover facts to support our determination and finding of compliance or non-compliance with the Act.

261. We decline to adopt CTIA's proposal to incorporate the CVAA's limitation on liability, safe harbor, prospective guidelines, and rule of construction provisions into our rules as

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[692] CEA Comments at 46 (narrative response and product design summary will likely better detail accessibility efforts); Verizon Comments at 15-16 (a narrative response from defendants detailing accessibility efforts would often be more appropriate).

[693] *See* 47 U.S.C § 618(a)(5)(C).

[694] Complainants may also request a copy of the public redacted version of a defendant's answer, as well as seek to obtain records filed by the defendant through a FOIA filing.

[695] CEA Comments at 46.

[696] 47 C.F.R. § 64.2009(e).

[697] TIA Comments at 28. *See also* CEA Comments at 46; CTIA Comments at 37-8..

affirmative defenses.[698] CTIA proposes that we adopt a bifurcated approach to our informal complaint process in which the Commission would determine whether certain affirmative defenses[699] were applicable before requiring the defendant to respond to the complaint in full. We believe that the approach we adopt today is more likely to maximize the efficient resolution of informal complaints than the approach that CTIA recommends. Our rules will afford a defendant ample opportunity to assert all defenses that the defendant deems germane to its case and assures that the Commission has a complete record to render its decision based on that record within the statutory 180-day timeframe. Because the Commission will be considering *all* applicable defenses as part of this process, we believe that singling out certain defenses to incorporate into our rules is unwarranted.

262. We also disagree with those commenters that express concern that the *Accessibility NPRM* did not appear to contemplate that some defendants may claim that their products or services are, in fact, accessible under Section 255, 716, or 718.[700] As noted above, the rules we adopt today afford defendants ample opportunity to assert such a claim as an affirmative defense to a charge of non-compliance with our rules and to provide supporting documentation and evidence demonstrating that a particular product or service is accessible and usable either with or without third party applications, peripheral devices, software, hardware, or customer premises equipment.[701] We recognize that different information and documentation will be required in an answer depending on the defense or defenses that are asserted. We expect defendants will file all necessary documents and information called for to respond to the complaint and any questions asked by the Commission when serving the complaint or in a letter of inquiry during the course of the investigation. Again, covered entities have the burden of proving that they have satisfied their legal obligations that a product or service is accessible and useable, or if it is not, that it was not achievable.

263. We also disagree with those commenters that contend that the answer requirements, particularly those related to achievability, are "broad and onerous and may subject covered entities to undue burdens."[702]

264. According to these parties, defendants will be compelled to produce, within an unreasonably short time frame, voluminous documents that may be of marginal value to complainants or the Commission in making determinations regarding accessibility and achievability of a particular product or service or in ensuring that an individual complainant

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[698] *See* Letter from Matthew Gerst, Counsel, External & State Affairs, CTIA, to Marlene H. Dortch, Secretary, FCC, CG Docket No 10-213, (filed Sept. 26, 2011) ("CTIA Sept. 26 *Ex Parte*").

[699] *See* CTIA Sept. 26 *Ex Parte*.

[700] CEA Comments at 45 (answer requirements "implicitly assume" that the product is not accessible); T-Mobile Comments at 15.

[701] Appendix B, §14.36.

[702] CEA Comments at 44; CEA Sept. 6, 2011 *Ex Parte* at 3 (expressing concerns regarding sweeping discovery and a wasteful litigation process); TIA Aug. 25, 2011 *Ex Parte* at 3 (arguing that the informal complaint process should avoid "burdensome discovery"). As discussed in more detail in Section III.E.2.d below regarding formal complaints, and as a cursory review of our enforcement rules, sections 14.33 – 14.52, shows, the informal complaint process is vastly streamlined compared to the formal complaint process; thus, we disagree with CTIA that our informal complaint process imposes the "burdens of the formal complaint process." *See* CTIA Aug. 11 *Ex Parte*, Attachment at 12.

obtains an accessible service or device as promptly as possible.[703] We address these concerns below.

265. We disagree with commenters that the 20-day filing deadline for answers is too short and that we should liberally grant extensions of time within which to file.[704] We believe that the 20-day filing window is reasonable given the 180-day mandatory schedule for resolving informal complaints.[705] Furthermore, the dispute assistance process, described in General Requirements, Section III.E.2.b, *supra,* requires that consumers and manufacturers or service providers explore the possibilities for non-adversarial resolution of accessibility disputes before a consumer may file a complaint.[706] Defendants will, therefore, have ample notice as to the issues in dispute even before an informal complaint is filed. In addition, all parties subject to Sections 255, 716, and 718 should already have created documents for their defense due to our recordkeeping rules. As discussed above, this *Report and Order* places manufacturers and service providers on notice that they bear the burden of showing that they are in compliance with Sections 255, 716, and 718 and our implementing rules by demonstrating that their products and services are accessible as required by the statutes and our rules or that they satisfy the defense that accessibility was not readily achievable under Section 255 or achievable under the four factors specified in Section 716.[707] They should, therefore, routinely maintain any materials that they deem necessary to support their accessibility achievability conclusions and have them available to rebut a claim of non-compliance in an informal complaint or pursuant to an inquiry initiated by the Commission on its own motion.

266. Further, we do not believe additional time to file an answer or provide responsive material is warranted for all complaints based on the possibility that the documentation supporting a covered entity's claim may have been created in a language other than English.[708] Our recordkeeping rules will require English translations of any records that are subject to our recordkeeping requirements to be produced in response to an informal complaint or a Commission inquiry. Parties may seek extensions of time to supplement their answers with translations of documents not subject to the mandatory recordkeeping requirements. We caution, however, that such requests will not be automatically granted, but will require a showing of good

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[703] AT&T Comments at 14-15; CEA Comments at 44; ITI Comments at 29; T-Mobile Comments at 15; Verizon Comments at 15-16. Additionally, some parties contend that the answer requirements are especially unwarranted given what they characterize as minimal standards for the complaint itself. *See, e.g.,* CTIA Comments at 36 ("The list is objectively burdensome especially in light of the lack of requirement for an evidentiary basis in the complaint and pre-filing notice that provides an opportunity for resolution."); ITI Comments at 29 (the Commission should require a prima facie showing in an informal complaint before requiring a respondent to produce documents.)

[704] AT&T Comments at 17; CEA Comments at 45; CTIA Comments at 40; TIA Comments at 26-27; T-Mobile Comments at 15; Verizon Comments at 14-15.

[705] We generally allowed 30 days to answer a Section 255 informal complaint in proceedings that carried no requirement for resolution by the Commission within a specified time frame and did not have compulsory recordkeeping requirements. *Section 255 Report and Order,* 16 FCC Rcd at 6471-72, ¶ 133.

[706] *See* General Requirements, Section III.E.2.b, *supra.*

[707] *See, e.g., Section 255 Report and Order*, 16 FCC Rcd at 6444, ¶ 62 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *Alexander v. Choate*, 469 U.S. 287 (1985) to support assigning the burden of proof to the party claiming a defense regarding achievability).

[708] *But see* CEA Comments at 45 (defendants may need additional time to translate non-English materials); TIA Comments at 28-29 (fact that many companies do not keep documents in English creates burdens).

cause.

267. Only a covered entity will have control over documents that are necessary for us to comply with the Act's directive that we (1) "investigate the allegations in an informal complaint" and (2) "issue an order concluding the investigation" that "shall include a determination whether any violation [of Sections 255, 716, or 718 has] occurred."[709] We reject commenters' concerns that the documentation requirements focus too strongly on broad compliance investigations rather than on ensuring that an individual complainant is simply able to obtain an accessible product or service.[710] Section 717(a)(1)(B)(i) specifically empowers us to go beyond the situation of the individual complainant and order that a service, or the next generation of equipment, be made accessible.[711] Thus, our investigations with respect to informal complaints are directed to violations of the Act and our rules – not narrowly constrained to an individual complainant obtaining an accessible product or service, as commenters suggest. The dispute assistance process, on the other hand, is designed to assist consumers, manufacturers, or service providers in solving individual issues before a complaint is filed. Covered entities will have ample opportunity, therefore, to address the accessibility needs of potential complainants.

268. Finally, we reject the suggestion that if a defendant chooses to provide a possible replacement product to the complainant, the Commission should automatically stay the answer period while the complainant evaluates the new product.[712] First, we expect that in virtually all cases, any replacement products will have been provided and evaluated during the pre-complaint dispute assistance process. Moreover, while suspending pleading deadlines may relieve the parties from preparing answers or replies that would be unnecessary if the manufacturer or service provider is able to satisfy the complainant's accessibility concerns, it would also substantially delay compilation of a complete record and thereby impede our ability to resolve the complaint within the mandatory 180-day timeframe, should private settlement efforts fail. Accordingly, we decline to adopt any procedure by which pleading deadlines would be automatically or otherwise stayed. We emphasize, nonetheless, that the parties are free to jointly request dismissal of a complaint without prejudice for the purpose of pursuing an informal resolution of an accessibility complaint. In such cases, if informal efforts were unsuccessful in providing the complainant with an accessible product or service, the complainant could refile the informal complaint at any time and would not be required to use the dispute assistance process again for that particular complaint.

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[709] 47 U.S.C. § 618(a)(3)(B). We disagree with CEA that this statute grants us authority to *sua sponte* close a complaint proceeding without issuing a final determination whether a violation occurs. Letter from Julie M. Kearney, Vice President, CEA, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 10-213, at 2-3 (filed on July 20, 2011) (arguing that the Commission may determine that a complaint has been resolved based on the defendant's response). However, where the complaint on its face shows that the subject matter of the complaint has been resolved, we may dismiss the complaint as defective for failure to satisfy the pleading requirements as discussed above. In addition, where the allegations in an informal complaint allege a violation related to a particular piece of equipment or service that was the subject of a prior order in an informal or formal complaint proceeding, then the Commission may issue an order determining that the allegations of the instant complaint have already been resolved based on the findings and conclusions of the prior order and such other documents and information that bear on the issues presented in the complaint.

[710] T-Mobile Comments at 15; CEA Reply Comments at 20.

[711] 47 U.S.C. § 618(a)(1)(B)(i).

[712] CEA Comments at 48.